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Nos. 02-909, 02-910

IN THE

Supreme Court of the United States

THREE O REALTY LLC,

Petitioner,

- and -

WEST 41st STREET REALTY LLC, *et al.*,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, d/b/a EMPIRE STATE DEVELOPMENT CORPORATION and 42nd ST. DEVELOPMENT PROJECT, INC.,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Given a record replete with support for the condemning agency's findings of blight, is the constitutionality of the taking undermined by Petitioners' self-serving and unsupported allegations that the blight findings are "pretextual"?

2. Should the condemning agency be barred from implementing a project to cure blight merely because the project is one of the later stages of a highly-successful multi-phased plan?

Statement Pursuant To Supreme Court Rule 29.6

Respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") is a political subdivision of the State of New York constituting a public benefit corporation. 42nd St. Development Project, Inc. is a wholly-owned subsidiary of ESDC.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
STATEMENT OF THE CASE	1
A. *The 42nd St. Project*	1
B. *ESDC's Authority To Acquire The Property*	4
C. *The Decisions Below*	4
ARGUMENT	7
SUMMARY OF ARGUMENT	7
POINT I	
THE DECISION BELOW IS FULLY CONSISTENT WITH WELL-ESTABLISHED CONSTITUTIONAL LAW AND PRECEDENT	8
A. *In Reviewing Condemnation Decisions, This Court Has Always Afforded Great Deference To Legislative And State Court Decisions*	8
B. *The Administrative Record Amply Supports The Condemning Agency's Blight Findings*	9

Contents

Page

POINT II

THERE IS NO EVIDENCE THAT THE STATED PURPOSE OF THE PROJECT IS PRETEXTUAL 15

POINT III

RESPONDENTS ARE NOT BARRED FROM IMPLEMENTING A PROJECT TO CURE BLIGHT MERELY BECAUSE THE PROJECT IS ONE OF THE LATER STAGES OF A MULTI-PHASED PLAN 20

POINT IV

THERE IS NO CONFLICT AMONG LOWER COURTS THAT WARRANTS THIS COURT'S REVIEW AND CERTIORARI SHOULD BE DENIED 24

APPENDIX — *Matter of New York State Urban Development Corp.* 1a

TABLE OF CITED AUTHORITIES

Page

CASES

Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98 (1954) . . 8, 9, 19

City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241 (1971) 20, 21, 22

Danforth v. United States, 308 U.S. 271, 60 S. Ct. 23 (1939) 22

Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 17 S. Ct. 56 (1896) 15

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321 (1984) 8, 9

Hendersonville Light & Power Co. v. Blue Ridge Interurban R. Co., 243 U.S. 563, 37 S. Ct. 440 (1917) 15

Hughes v. Consol-Pennsylvania Co., 945 F.2d 594 (3d Cir. 1991) 15

Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400 (1986) 18

Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 43 S. Ct. 684 (1923) 18

Matter of New York State Urban Dev. Corp. (Hotel Strand), Index No. 44607/91 (Sup. Ct. N.Y. Co. Aug. 18, 1997) 17

Cited Authorities

Page

Murray v. La Guardia, 291 N.Y. 320 (1943), *cert denied*, 321 U.S. 771 (1944) 15

Niagara Frontier Building Corp. v. State of New York, 33 A.D.2d 130 (4th Dep't 1969), *aff'd*, 28 N.Y.2d 755 (1971) 22

Old Dominion Co. v. United States, 269 U.S. 55 (1925) 9

Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923) 9

Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp., 605 F. Supp. 612 (S.D.N.Y.), *aff'd*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018, 106 S. Ct. 1204 (1986) 16, 17, 19

Swan Lake Hunting Club v. United States, 381 F.2d 238 (5th Cir. 1967) 15

United States v. Gettysburg Electric R. Co., 160 U.S. 668 (1896) 8

Washington-Summers, Inc. v. City of Charleston, 430 F. Supp. 1013 (S.D. W. Va. 1977) 15

West 41st St. Realty Corp. v. New York State Urban Dev. Corp., 277 A.D.2d 47 (1st Dep't 2000), *leave to appeal denied*, 96 N.Y.2d 705 (2001) .. 23

Cited Authorities

Page

UNITED STATES CONSTITUTION

Fourteenth Amendment 9

STATUTES

N.Y. Unconsol. Laws § 6254 4

N.Y. Unconsol. Laws § 6260 ..... 4, 15

N.Y. Unconsol. Laws § 6263 4

26 Am. Jur. 2d Eminent Domain §§ 1-3 8

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. *The 42nd St. Project*

The 42nd Street Development Land Use Improvement Project (the "42nd St. Project") involves the revitalization of approximately 13 acres of land in the Times Square area of

midtown Manhattan. (R 381).[1] The 42nd St. Project was developed in response to rampant crime, substandard and insanitary conditions, undesirable uses and physical and social blight in the area. (R 86). The New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") and 42nd St. Development Project, Inc. ("42DP") have carried out the 42nd St. Project in phases, beginning in 1990. (R 381, 384). Each of the earlier stages of the 42nd St. Project successfully reduced blight in the areas affected. (R 382-85, 399-400).

The current phase of the 42nd St. Project involves development of a long-blighted area known as Site 8 South (the "Project").[2] The Project calls for the use of ESDC's eminent domain power to acquire blighted, obsolete and underutilized buildings and surface parking lots from 11 different property owners, four of whom are the Petitioners. The Project will reinforce, improve and continue the metamorphosis of the 42nd St. Project area by further eliminating blighted conditions and the resultant drain on municipal resources, enhancing tax revenues, and further stabilizing the Times Square area. (R 373-74, 417).

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[1] "R" citations are to the printed record in the Supreme Court of the State of New York, Appellate Division, First Department. The 42nd St. Project extends from 7th to 8th Avenues between 40th and 43rd Streets.

[2] Site 8 South is across the street from the Port Authority Bus Terminal on Eighth Avenue between 40th and 41st Streets, extending approximately half a block east toward Seventh Avenue.

ESDC underscored the vital need to develop Site 8 South in its November 2001 Determination and Findings:

> The blight in the area takes various forms: socially in disproportionate crime statistics and a tarnished City image, particularly for visitors entering the City at the Port Authority Bus Terminal; physically, in obsolete buildings and underutilized parcels; and economically, in disproportionate drains on municipal services and underutilized tax and employment potential. Eradication of these continuing substandard and blighted conditions will yield benefits for the Project area, the 42nd Street Project area, and the City. (R 373).

The proposed development will provide economic, social and physical benefits to the City and State of New York, and will transform a blighted, deteriorated, substandard, insanitary and underutilized site to full productive use. (R 373-74, 402, 417, 419-21, 640-41, 644). The Project will reduce crime, increase employment, boost tax revenue, and create much needed class A office space in the area. (R 373, 630-35, 641).

As the new headquarters for The New York Times, with an additional 700,000 square feet of office space, retail uses at grade, and an auditorium available for public use, the completed development will be active and alive 24 hours a day. Retail uses will enliven the side streets into the evening hours, attract passers-by, and discourage the current loitering and other anti-social behavior. (R 421). The tower itself, with its glass facade, will provide a dramatic icon for the City's skyline and a visual anchor for the area. (R 425-27).

B. *ESDC's Authority To Acquire The Property*

In 1968, the New York State legislature created ESDC and empowered it to acquire property in any lawful manner, pursuant to the provisions of the Eminent Domain Procedure Law ("EDPL"). New York Urban Development Corporation Act §§ 4 and 13, N.Y. Unconsol. Laws §§ 6254 and 6263. In the case of land use improvement projects, ESDC is required to make findings that the project area "is a substandard or unsanitary area, or is in danger of becoming a substandard or unsanitary area and tends to impair or arrest the sound growth and development of the municipality" and that "the plan or undertaking affords maximum participation by private enterprise, consistent with the sound needs of the municipality as a whole." N.Y. Unconsol. Laws § 6260(c).

ESDC made and updated detailed findings of substandard conditions both in its Basis for Blight Findings and the addenda thereto (R 508-45) and in its Environmental Review Technical Assessment (R 397-428). ESDC also concluded that the Project will allow maximum participation by private enterprise to provide what the City greatly needs – employment opportunities, enhanced tax revenue, and a renewed showing of dedication from the business community to the City. (R 373, 630-35, 641).

C. *The Decisions Below*

In December 2001, Petitioners[3] challenged the Project by initiating an original proceeding in the Supreme Court of

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[3] This brief is submitted in opposition to the petitions for writs of certiorari of (1) Three O Realty, LLC (no. 02-909) and (2) West 41st Street Realty LLC, EMM Realty Corp., and Times Square Garage, Ltd. (02-910). Both petitions were filed against respondents New York State Urban Development Corporation d/b/a Empire State (Cont'd)

the State of New York, Appellate Division, First Department. (R 65-85). Petitioners set forth two claims in their petition. First, they argued that the Project served a private rather than a public purpose. This claim was supported only by Petitioners' own inflammatory assertions that the stated public purpose is pretextual. Second, Petitioners asserted, again without the slightest support, other than their own unsubstantiated assertions, that the proposed taking is unconstitutional because Respondents refused to permit Petitioners to develop their properties. (West 41st St. Pet. App. C (12a)).

On June 20, 2002, the Appellate Division unanimously dismissed Petitioners' challenges to ESDC's determination and findings. The Appellate Division decided the case by rejecting the factual foundations of the Petitioners' arguments. The Appellate Division found as a factual matter that "[t]he record shows that 'the exercise of the eminent domain power is rationally related to a conceivable public purpose,' that purpose being the further reduction of the blight that has long pervaded the subject area." (West 41st St. Pet. App. 10a) (citations omitted). The Appellate Division specifically noted that "[a]n active drug trade persists" at the site (*Id.* at 10a). The Appellate Division also found as a factual matter that "the record is devoid of evidence which

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(Cont'd)

Development Corporation and 42nd St. Development Project, Inc. Because both petitions object to the same urban redevelopment project and present similar factual and legal arguments, Respondents are submitting this single response to these petitions for the Court's convenience.

"Three O" citations refer to the first petition (02-909) and "West 41st St." citations refer to the second petition (02-910).

would support Petitioners' conclusory allegations that the long-standing prospect of condemnation barred them from ameliorating or eliminating the persistent blight in the project area." (West 41st St. Pet. App. 10a-11a).

On June 26, 2002, the Petitioners purported to appeal as of right to the New York Court of Appeals. On September 12, 2002, the Court of Appeals dismissed Petitioners' appeals, stating that "no substantial constitutional question is directly involved." (West 41st St. Pet. App. A (1a-2a)). No discretionary appeal was ever sought by the Petitioners to the Court of Appeals.

Pursuant to a condemnation proceeding in the Supreme Court, State of New York, title to all the properties in Site 8 South was transferred to ESDC on August 19, 2002. Due to ESDC's relocation efforts, the site is already half vacant. For example, more than 120 tenants from one building have moved and received relocation payments, and the owner of that building accepted a multi-million dollar settlement for its property.

At no time during the relocation process have Petitioners attempted to seek relief from any other court. Even after the New York Court of Appeals dismissed their appeals, Petitioners waited nearly 90 days before filing their petitions for writs of certiorari.

ARGUMENT

SUMMARY OF ARGUMENT

Petitioners allege – without any evidentiary support in the record – that the stated public purpose of the Project is pretextual and that they could have developed the site themselves. On the basis of their unsupported assertions, Petitioners are asking this Court to question well-established precedent, which has consistently afforded great deference to legislative judgments.

Given a record replete with support for ESDC's blight findings and public purpose determination, this case does not raise any constitutional issue. The fact that this Project will incidentally benefit private entities does not undermine the constitutionality of the taking.

There is no evidence in the record that Petitioners ever tried to develop Site 8 South on a private basis or that they even had the ability to do so, since they do not control the entire site. Their property is not permanently insulated from condemnation merely because this Project is the latest phase in a highly-successful multi-phased urban redevelopment project.

POINT I

THE DECISION BELOW IS FULLY CONSISTENT WITH WELL-ESTABLISHED CONSTITUTIONAL LAW AND PRECEDENT

A. *In Reviewing Condemnation Decisions, This Court Has Always Afforded Great Deference To Legislative And State Court Decisions*

It has long been recognized that the power of eminent domain, one of the most ancient and significant sovereign prerogatives, grants government and its authorized agents considerable latitude and discretion to take privately owned property, without the owner's consent, for a public use. *See generally* 26 *Am. Jur. 2d Eminent Domain* §§ 1-3. This Court has never held a compensated taking to be unconstitutional.

Judicial review of a condemnation decision is narrowly circumscribed. *Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 102 (1954). This Court has long held that "it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241, 104 S. Ct. 2321, 2329 (1984) (*quoting United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

The Court has made clear that:

> when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served

> by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. *Berman*, 348 U.S. at 33, 75 S. Ct. at 102.

Courts may reject a legislative decision to condemn property only if the decision was not "rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. 229, 241, 104 S. Ct. 2321, 2329 (1984). Judicial "deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.'" *Midkiff*, 467 U.S. at 240, 104 S. Ct. at 2329 (*quoting Berman*, 348 U.S. at 32, 75 S. Ct. at 102 and *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

In *Berman*, the Court defined "[t]he concept of public welfare [as] broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." 348 U.S. at 33, 75 S. Ct. at 102-03. It may include beautification and the creation of a healthy, spacious, clean, well-balanced and carefully patrolled area. *Berman*, 348 U.S. at 33, 75 S. Ct. at 102-03. The determination of what constitutes a public use "is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State." *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 705-06 (1923).

B. *The Administrative Record Amply Supports The Condemning Agency's Blight Findings*

The record in this proceeding is replete with findings — and support for the findings — that Site 8 South is marked by substandard and blighted social, physical, and economic

conditions, and that the acquisition and subsequent development of Site 8 South will serve the public interest. The record substantiates the blighted conditions plaguing Site 8 South including, *inter alia*, prostitution, drug use, underutilization, a disproportionate amount of crime and resulting drains on municipal resources and underutilized tax and employment potential. (R 373). Economically, Site 8 South now provides only a fraction of its tax and employment capability.

ESDC's Basis for Blight Finding and the addenda thereto detail the conditions on Site 8 South from 1981 through 2001. (R 508-545). These findings show that blight at Site 8 South pre-dated the 42nd St. Project, that blight continues, and that, without public intervention, there is no reason to believe blight will cease to exist. Despite Petitioners' assertions that blight in Site 8 South was exclusively a problem of the past, ESDC's most recent Basis for Blight Finding (Third Addendum, August 2001) outlines the existing blight in Site 8 South:

* Site 8 South is "developed only to a fraction of [its] theoretical capacity." It is occupied by two large undeveloped parking lots, a parking garage, and several relatively small, low-rise buildings;

* The buildings in Site 8 South generally present a shabby gateway to the Times Square area, particularly for workers, visitors, and tourists arriving in Manhattan via the Port Authority Bus Terminal across Eighth Avenue;

* Prostitution, drug use, and loitering are still common along Eighth Avenue in the vicinity of Site 8 South, particularly around the many sex-related businesses that remain in retail storefronts; and

* These unseemly uses and the resulting lack of most desirous amenities have the secondary effect of discouraging pedestrians from lingering in the area, which has retarded the area's revitalization and adversely affected nearby areas.

(R 544-45).

The 2001 Environmental Review Technical Assessment, performed for ESDC by an independent environmental consultant, spells out how Site 8 South is both underused and underdeveloped:

> [A]ll of the Site 8 S stores are inconsistent with the overall Project's scale, intended uses and atmosphere. Lots 14 and 53 [the surface parking lots] are undeveloped, and at Lot 15, the upper floors are sealed off entirely. None of the existing uses support the Project goals. . . . such as restoring the Project area's role as a positive influence on the adjacent communities, and increasing the Project area's economic contribution to the City as a whole.

(R 419). The 2001 Environmental Review Technical Assessment elaborates on the problems surrounding the sex-oriented businesses in Site 8 South:

> Approximately five adult entertainment uses operate at Site 8 S. . . . Such businesses continue to maintain exclusively sex-related merchandise and, accordingly, continue to create the secondary effects of blight, increased loitering, and crime.

> Site 8 S is the only remaining 42nd Street Development Project site that still retains several adult-related businesses. . . . As a whole, these adult related uses continue to contribute to blighting elements on Site 8 S and within the surrounding neighborhood.

(R 420). The 2001 Environmental Review Technical Assessment also addresses the loitering and lack of street traffic on portions of the Site:

> Portions of Site 8 S continue to attract loitering and other undesired street presence. Tourists and commuters hurry in and out of the area, discouraged by the poor street-level conditions and the lack of positive amenities. Most of the retail establishments close early; for most pedestrians, this absence of positive street activity is highlighted at night by the presence of a bar and sex-related establishments.

(R 420-21). The 2001 Environmental Review Technical Assessment further cautions that these unfavorable conditions will persist in the absence of development on Site 8 South:

> With the exception of Site 8 S and Site 8 N, the blighted conditions within the [Times Square] area are expected to disappear. In 2005, existing uses on Site 8 S and Site 8 N otherwise would remain inconsistent with both the Project and surrounding areas, and would continue to discourage pedestrian activity along the eastern side of Eighth Avenue south of 42nd Street.

(R 421).

The testimony of various community leaders at the September 2001 public hearing on the proposed condemnation of Site 8 South provides direct support for these conclusions. Many individuals described in detail the physical blight, decay, economic underdevelopment, and unseemly business and pedestrian activity that marks Site 8 South. The excerpts that follow from the transcript of the hearing reflect the consistent agreement on the many ways that the public will benefit from the proposed development on Site 8 South.

Bill Daly, the director of public services for the Fashion Center Business Improvement District, described the present conditions of blight in Site 8 South:

> The particular site we are addressing at this public hearing now contains small storefronts that are clustered among five adult entertainment establishments that exist side by side and create the atmosphere of a mini red light district.
>
> Such a concentration of sex businesses, combined with the low-end retail and food establishments, provides an enclave for criminals to loiter and drug dealers to ply their trade on the sidewalk.
>
> It is time to finally put an end to these conditions, and doing so will encourage the rebirth of this part of Eighth Avenue in the West Thirties.

(R 667-68).

Virginia Sullivan, the acting director of the Office of Midtown Enforcement of the Office of the Mayor, echoed those observations:

> The Mayor's Office of Midtown Enforcement fully supports the proposed project to further improve conditions in this area because our tools alone are not sufficient.
>
> City inspectors from the Buildings, Fire and Health Departments assigned to our Office continually issue code violations to the businesses in this area as well as along Eighth Avenue.
>
> Just this past May our Office brought a nuisance abatement action against a premise within the proposed site, 636 Eighth Avenue, used for the fencing of stolen goods and for the sales of drug paraphernalia.
>
> The proposed site also houses mostly adult use establishments, such as adult video stores and peep shows that are not covered by the current Adult Use Laws since they do not fall within the required distance of any sensitive receptor. . . .
>
> These establishments located in the site area attract a less than savory element who linger in front of the establishment morning and night and contribute to the general feeling of unsafety.

(R 669-70).

These statements, and others like them (R 629-32), support ESDC's conclusion that Site 8 South is blighted and that the proposed development will substantially benefit the surrounding area and the City as a whole.

POINT II

THERE IS NO EVIDENCE THAT THE STATED PURPOSE OF THE PROJECT IS PRETEXTUAL

Petitioners argue that "the taking is unconstitutional because it is being carried out for the private purpose of substituting one private developer for another, not for the purported public purpose of eliminating blight." (West 41st. St. Pet., p. 13; Three O Pet., pp. 25-26). That this Project benefits private entities does not negate or even call into question the valid public purpose of the Project. Under ESDC's enabling legislation, ESDC is required to "afford maximum opportunity for participation by private enterprise . . ." N.Y. Unconsol. Laws § 6260(c). The fact that the Project may advance incidental private interests of the New York Times Company and the developer of additional office space is not unlawful and does not detract from its public purpose. *See Murray v. La Guardia*, 291 N.Y. 320, 329-30 (1943), ("[I]f, upon completion of the project the public good is enhanced it does not matter that private interests may be benefited."), *cert. denied*, 321 U.S. 771 (1944); *Hughes v. Consol-Pennsylvania Co.*, 945 F.2d 594, 613 (3d Cir. 1991); *Swan Lake Hunting Club v. United States*, 381 F.2d 238, 242 (5th Cir. 1967) (*citing Hendersonville Light & Power Co. v. Blue Ridge Interurban R. Co.*, 243 U.S. 563, 37 S. Ct. 440 (1917)); *Washington-Summers, Inc. v. City of Charleston*, 430 F. Supp. 1013, 1015 (S.D. W. Va. 1977) (*citing Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 161-62, 17 S. Ct. 56 (1896)).

For Petitioners to allege instead that the stated purpose is "pretextual" would require specific proof that the stated purposes are a sham and a fraud. *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 605 F. Supp. 612, 618 (S.D.N.Y.), *aff'd*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018, 106 S. Ct. 1204. (1986). In *Rosenthal & Rosenthal, Inc.*, the Court considered an earlier challenge to the 42nd St. Project and found that "it would be quite reasonable for the project planners to conclude that this kind of large scale redevelopment, bringing thousands of new people into the neighborhood and radically changing the physical configuration of the area, would further the Project's overall goals of eliminating blight and revitalizing Times Square." 605 F. Supp. at 619.

There is no direct evidence nor can any inference reasonably be drawn that the stated purpose of the Project is pretextual. Petitioners argue this point by stating they could have eliminated existing blight themselves if they had been "permitted" to develop the property. (West 41st St. Pet., pp. 6-7, 14). Yet Petitioners cite no instances of their trying to develop the properties or any denial or interference with any application for a construction permit, zoning variance or financing. Nor do they cite to any regulatory action by Respondents, or any other authority, that interfered with Petitioners' right or ability to develop their property. In fact, Respondents in no way interfered with the financing or development of the Site and, in fact, have no authority to grant or deny building permits or zoning changes.

While Petitioners contend that they could have removed the blight themselves, this claim is entirely unsupported in the record. In fact, the diversity of land ownership on Site 8 South (ten relatively small separately-owned parcels) has prevented private sector assemblage. A lower court drew this conclusion as a factual matter during the valuation proceeding of another

site in the 42nd St. Project. *See Matter of New York State Urban Dev. Corp.* (*Hotel Strand*), Index No. 44607/91 at 7 (Sup. Ct. N.Y. Co. Aug. 18, 1997) ("Nor was there any indication that without condemnation [claimant's alleged potential] assemblage would have been undertaken privately and a market for claimants' parcel (or air rights) created thereby 'within a reasonably close future.'").[4]

Numerous sites in Manhattan have not been developed for decades because of such fragmented ownership, most important for present purposes, West 42nd Street before the earlier stages of the 42nd St. Project. *Rosenthal & Rosenthal*, 605 F. Supp. at 618:

> Nothing in the Constitution prevents a state from deciding that in a particular area diversity of land ownership stands in the way of full economic development, and that assembling a major site to be developed as a piece is the best way to serve the public purposes of eliminating blight, creating jobs, and broadening the tax base.

Petitioners' claim that existing blight will disappear in the absence of condemnation is wholly speculative and belied by decades of inaction at Site 8 South and neighboring properties. This claim is also belied by the record before this Court. Site 8 South was blighted long before the inception of the 42nd St. Project; it was blighted when Respondents issued the Determination and Findings challenged in this proceeding; it remains blighted.

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[4] Pursuant to Supreme Court Rule 15.3 and 24.1(j)(3), a copy of *Matter of New York State Urban Dev. Corp.* (*Hotel Strand*), Index No. 44607/91 at 9a (Sup. Ct. N.Y. Co. Aug. 18, 1997) is reproduced in resp. app. (1a-13a).

The existence of a valid public purpose in eliminating blight in the Times Square area has already been determined. *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400 (1986). Petitioners concede the removal of blight is a valid public purpose (Three O Pet., p. 6). Respondents are in a position to remove the blight effectively and efficiently. This conclusion is firmly supported in the record and it is precisely what ESDC was created to do and has done successfully in the 42nd Street Project to date.

By arguing that ESDC should have chosen one of the Petitioners to develop Site 8 South, Petitioners are, in effect, arguing that ESDC did not choose the best, most efficient or most desirable way to go about removing blight at Site 8 South. The necessity and expediency of a taking, however, is not a question for the courts:

> That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. *Adirondack Railway v. New York City*, *supra*, 176 U. S. at 349, 20 Sup. Ct. 460; *Shoemaker v. United States*, 147 U.S. 282, 298, 13 Sup. Ct. 361; *United States v. Gettysburg Electric Railway*, 160 U.S. 668, 685, 16 Sup. Ct. 427; *Boom Company v. Patterson*, 98 U.S. 403, 406. Neither is it any longer open to question in this court that the Legislature may confer upon a municipality the authority to determine such necessity for itself. *Bragg v. Weaver*, *supra*, 251 U. S. at 58, 40 Sup. Ct. 62; *Sears v. City of Akron*, 246 U.S. 242, 251, 38 Sup. Ct. 245. The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.

Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 678, 43 S. Ct. 684, 689 (1923).

Petitioners also argue that this taking is unnecessary because their own properties are not blighted. (Three O Petition, p. 20). As the excerpts from the record cited above demonstrate, Site 8 South is entirely blighted. Two of the Petitioners herein own the two wholly underutilized surface parking lots on the site. Even if isolated pockets of the site were found not to be blighted, however, the relevant inquiry focuses on the condition of the site as a whole. *Rosenthal & Rosenthal*, 605 F. Supp. at 615-16, 617; 771 F.2d at 46. This Court has long held that a condemning agency may take for a public use property "which, standing by itself, is innocuous and unoffending." *Berman*, 348 U.S. at 35, 75 S. Ct. at 104. The Court reasoned as follows:

> If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. . . . [C]ommunity redevelopment programs need not, by force of the Constitution, be on a piecemeal basis — lot by lot, building by building. It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. . . . It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.

Berman, 348 U.S. at 35-6, 75 S. Ct. at 104 (citations omitted).

POINT III

RESPONDENTS ARE NOT BARRED FROM IMPLEMENTING A PROJECT TO CURE BLIGHT MERELY BECAUSE THE PROJECT IS ONE OF THE LATER STAGES OF A MULTI-PHASED PLAN

Petitioners argue that inclusion of their property as part of the 42nd St. Project prevented them from developing their property in violation of their due process rights. (West 41st St. Pet., pp. 16-19). They claim that because it was well-known that their property was part of the 42nd St. Project and might one day be condemned, they were unable to obtain financing or long-term-tenant commitments. Petitioners then claim that as a result of this alleged deprivation, their property is now insulated from condemnation entirely. Petitioners' claims are unsupported in the record as a factual matter; they are unsupported by the cases they cite; and they are barred by established precedent.

Confronted with pervasive and persistent blight in older urban and commercial areas throughout this State, the New York State Legislature recognized the need for a sustained effort by the public sector in conjunction with the private sector to remedy these conditions. That Respondents have already made substantial progress in the area does not mean that they cannot carry out the remaining phases of the 42nd Street Project.

Petitioners do not and cannot argue that their ability to develop their property was directly prevented by some action of ESDC, such as refusal to issue a building permit or passing of restrictive zoning rules. In *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241 (1971), the New York Court of Appeals

addressed the *de facto* taking concept implicitly raised by Petitioners:

> [T]he concept of *de facto* taking has traditionally been limited to situations involving a direct invasion of the property or a direct legal restraint on its use . . . and to hold that there can be a de facto taking appropriation absent a physical invasion or direct legal restraint would, needless to say, be to do violence to a workable rule of law.

In *City of Buffalo*, the city told the property owner of its intent to condemn, led him to move his printing business, and then delayed several years before deciding to condemn his property. The Court of Appeals held:

> The facts herein fail to disclose any act upon the part of the condemning authority which could possibly be construed as an assertion of dominion or control . . . We simply have a manifestation of an intent to condemn and such, even considering the protracted delay attending final appropriation, cannot cast the municipality in liability upon the theory of a 'taking' for there was no appropriation of the property in its accepted legal sense.

City of Buffalo, 28 N.Y.2d at 255.

The record is devoid of any facts that Respondents have in any way restricted Petitioners' rights to develop their property. At best, Petitioners are claiming that their right to develop their property was impaired as a result of public discussion and plans to redevelop through condemnation,

if necessary. The planning and attendant publicity, controversy, litigation and delay with respect to multi-billion dollar remedial projects do not, however, rise to the level of a *de facto* or regulatory taking of property.

> A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as 'a taking' in the constitutional sense.

City of Buffalo, 28 N.Y.2d at 255 (*quoting Danforth v. United States*, 308 U.S. 271, 285, 60 S. Ct. 231, 237 (1939)). If Respondents were responsible for affirmative, value-depressing acts that resulted in diminished property value, Petitioners could seek damages under a theory of condemnation blight. *Niagara Frontier Building Corp. v. State of New York*, 33 A.D.2d 130, 133 (4th Dep't 1969), *aff'd*, 28 N.Y.2d 755 (1971); *City of Buffalo*, 28 N.Y.2d at 257-58. Petitioners' resulting award would "be based on the value of the property as it would have been at the time of the *de jure* taking, but for the debilitating threat of condemnation." 28 N.Y.2d at 258. Petitioners allege no such acts because none occurred. Even if they had occurred, the remedy is damages in the condemnation proceeding not an injunction against taking the property.

Petitioners also argue that Respondents actively prevented development of Site 8 South by "litigat[ing] state-law statutory issues all the way to the New York Court of Appeals" and by "rebuff[ing] a formal offer by the landowners of Site 8 South to develop the Site." (West 41st St. Pet., p. 17). In fact, it was two of the Petitioners herein

who filed an action seeking declaratory relief that acquisition of their property was time-barred. Petitioners lost that action and unsuccessfully appealed to the New York Court of Appeals. *250 West 41st St. Realty Corp. v. New York State Urban Dev. Corp.*, 277 A.D.2d 47 (1st Dep't 2000), *leave to appeal denied*, 96 N.Y.2d 705 (2001). The Court of Appeals denied the requested declaratory relief.

While that action was pending, ESDC and 42DP representatives met with more than a dozen developers, including a principal of one of the Petitioners concerning possible development of Site 8 South. (R 182). The principal of Petitioner West 41st St., which only took title to property at the Site in 2001, submitted a letter to Respondents in 1999, stating that the plaintiffs who brought the state court action seeking a declaratory judgment (referenced in the preceding paragraph) would discontinue that action with prejudice if West 41st St. were designated the sole developer of Site 8 South. (*Id.*) In fact, West 41st St. explained in the letter that the plaintiffs in that action (two of the Petitioners herein) were *contractually obligated to agree to condemnation* if he became the sole developer of the Site. (*Id.*). Thus, the Project would have proceeded unchallenged by several of the Petitioners if ESDC had simply chosen the now disappointed West 41st St. as developer, even though the public-private partnership would create the same public use issues alleged here.

The large size of Site 8 South mandated, and 42DP actively searched for, a creditworthy developer with the strong prospect of a major tenant in the private market. West 41st St. did not present a specific proposal, did not demonstrate to 42DP that it had financing in place, and did not have a long-term commitment from a major tenant.

POINT IV

THERE IS NO CONFLICT AMONG LOWER COURTS THAT WARRANTS THIS COURT'S REVIEW AND CERTIORARI SHOULD BE DENIED

One of the Petitioners argues that "[t]here is a split in the Circuits and the State Courts on whether pretextual blight findings may satisfy the Takings Clause's 'public use' requirement." (Three O Pet., p. 21). The other Petitioners argue that there is a conflict among courts as to whether it is constitutionally permissible to take private property from one owner *in order* to give it to another landowner for its private purposes. (West 41st St. Pet., pp. 14-15). Both these arguments are preposterous. No case has ever held that a pretextual blight finding is sufficient to satisfy the Constitutional public use requirement. Nor has any case in modern jurisprudence ever held that the state may take private property for the purely private *purpose* of giving it to another landowner.

A close review of the cases cited by Petitioners indicates that other courts reviewing condemnation decisions routinely apply the same principles of condemnation law as the court did below. The only material differences between the cases cited by Petitioners and this case are the facts and outcomes of the respective cases. That different facts produce different outcomes hardly suggests a conflict. The purported conflict simply does not exist and review by this Court is unnecessary.

Dated: New York, New York
January 13, 2003

Respectfully submitted,

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APPENDIX

APPENDIX — MATTER OF NEW YORK STATE URBAN DEVELOPMENT CORPORATION
(Hotel Strand)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 24

In the Matter of the Application of the New York State Urban Development Corporation to acquire title in fee to certain real property necessary for a land use improvement project known as

42ND STREET DEVELOPMENT PROJECT

Index No. 44607/91

Claimant: 206 WEST 43RD STREET HOTEL CORP
(HOTEL STRAND)
Block 1014, Lot 37
206-208 West 43rd Street
New York, New York

PARNESS, J.:

This is a proceeding under Article 7 of the EDL to determine the compensation to be paid claimant in this condemnation proceeding. Vesting date was April 18, 1990. The subject premises was taken as part of the 42nd Street Time Square Redevelopment Project (Project). It contains a 12 story and basement hotel with two street level store spaces sited on a 30' x 100' lot and is located on the south side of 43rd Street some 100 feet west of Seventh Avenue in the Times Square area of Manhattan (206-208 West 43rd Street). The property was assessed at $1,260,000 (transitional $1,072,000).

Appendix

The hotel has a total of 107 rooms, 45 with private bath and 62 without. At vesting it was closed, by court order, because of pervasive drug activity. When operating it appeared to be more of a SRO rooming house rather than a hotel providing, basically, shelter at modest prices with minimum tradition hotel services. The posted "day rates" can best describe this type of hotel and some of its daily clientele. Built in 1905, the building had been permitted to deteriorate both physically and in the manner of its operation.

Essentially claimant's appraiser, Albert, opined highest and best use to be demolition of the existing structure and utilization of the lot for high rise development either by itself or in conjunction with adjoining properties made similarly available for development (Tr 2667, 2677). Through his analysis of comparable sales of properties purchased for development, at or near the Times Square area, he found a development land value for the subject parcel of $100 per square foot (S/F) when a 1987 valuation date is used, and $110 S/F for the vesting date in 1990.

Albert's referencing of 1987 for a valuation rate is grounded in his opinion that absent the "threat of condemnation" — which he contends began late in 1970's or early 1980's when word of the proposed project became public — the property would have been developed as were others in the mid Manhattan area during the heightened building period of the 1980's. As examples, he cites certain hotel and other commercial construction which took place at that time just north of the subject parcel. Such development was spurred on in part by zoning changes which, under certain conditions, granted an increase in the permitted

floor area ratio (FAR) from 15 to 18, resulting in increases in buildable areas permitted on a site. Albert therefore, in determining his land value, selects 1987 valuation date so as to obtain the benefit of this potential enhanced FAR. However, he also submits an alternate appraisal at the FAR 15 in affect on the date of vesting.

As another valuation approach, Albert hypothesized retention of the existing operating hotel for which he obtains a value based upon analysis of comparable sales of hotels and in his rebuttal appraisal, through income capitalization. He then opined an additional value based upon presumed sale of the property's air rights to a developer of a neighboring site. This is predicated again upon his assumption that private development would have occurred in the block in which the subject property is located absent the project.

His damage values, whether he opines sale and demolition of existing structure, or in the alternative, retention of the hotel and sale of air rights, of course, differ depending on whether an FAR 15 or 18 is applied to his lot square footage.

An FAR of 18 (his valuation date 4/18/87) produces for this expert a vacant lot value, after deducting the cost of demolition, of $4,800,000.00 while for a FAR of 15 he finds a vacant lot value of $4,370,000.00.

As stated, under his alternate valuation approach, he retains and obtains a value for the existing structure with an additional value based upon a sale of unused air rights to hypothesized adjacent development site. From his analysis of comparable hotel sales he finds a value for the subject

premises of $80 per S/F of gross building area which when applied to the existing hotel's 28,315 S/F results in a hotel building value of $2,265,000.00. To this he adds an additional $1,100,000.00 for saleable unused air rights (16,880 S/F at $90 a S/F) to yield a total damage value of $3,365,000.00.

Condemnor's expert, Haims, found present use as highest and best. He obtained value through income capitalization. From what he determined to be the hotel's actual gross income from room rentals, he obtained a fall-out room rate of $30 a day. This $30 daily rate when annualized (365 days) and applied to the 107 rooms and then subjected to a vacancy rate of 50% which Haims opines for this hotel, results in a gross room rental income of $600,000 (30/day x 365 days x 107 rooms x 50% vacancy). To this he added $55,500 as potential street level store rental income (10,000 S/F at $55 S/F) and $10,000 for potential signage income. The result is an effective gross rental income of $668,150 (after a 5% [$2,750] allowance for vacancy and collection loss against non-payment-hotel income). From this gross he deducts stabilized expenses of $434.00 (see Haims' appraisal P. 60) obtained through his analysis of comparable hotel expenses yielding a net operating (NOI) income of $235,000 before real estate taxes. He then deducted real estate taxes in the sum of $45,854. He anticipates an increase of $9,929 over the property's present taxes of $35,924 as a result of the values found for this property (P. 61 of his appraisal). After deducting taxes, he subjected the resulting NOI of $189,146 to a capitalization rate of 11.6% which yielded his value for this property of $1,600,000.

Appendix

Essentially, the great disparity in value conclusions is due to the experts differing opinions as to the properties "highest and best use"; i.e. Haims adopting present use and Albert a future one. Highest and best use determines value and compensation to be paid whether or not it is the present or existing use (Matter of the City of New York [Dexter Motors Inc.], 21 A.D.2d, 652, aff'd, 16 New York 2d 814).

Albert contends that, but for the threat of the instant condemnation from the late 1970's onward, the subject parcel's, highest and best use was as part of a development site and absent the project it would have been marketable during that period at appropriate development land values. Haims disputes this, opining that the development in the immediate block in which the subject property was located was precluded by various socio-economic factors, such as crime, a large homeless population, land marking of adjoining theatres, and cost of assemblage.

While it is always difficult to speculate as to what would probably have happened with the subject property had not the project taken place, certain factors are particularly relevant as to such probability. What certainly is relevant is the social and economic conditions of this portion of Times Square which conditions pre-existed the project, particularly as to their impact upon redevelopment.

The 42nd Street Development Project had as its principal purpose the elimination of blighted conditions in certain portions of the Times Square/42nd Street area, and replacement with attractive and economically productive uses. The project area focused on two blocks facing 42nd Street from 7th to

8th Avenus. Included also are certain properties facing the Port Authority Bus Terminal and others in the Times Tower block, the "crossroads" block bounded by 7th Avenue, Broadway 41st and 42nd Streets as well as a portion of the block between 42nd and 43rd Streets east of Broadway.

The original development of Times Square as a central commercial and entertainment area can be traced to the early 1900's when it became a transportation hub due in no small part to the new subway system. During these early periods some of the famous commercial buildings such as the Times Tower and Astor and Knickerbocker hotels were opened. With legitimate theatre development, the area in the early period became famous as the "Great White Way". However, by the late 1920's and early 30's, the area became honky tonk. Many of the theatres in the project area were converted to movie houses. Deterioration began and almost no construction occurred in the project area since the early 1920's, the legitimate theatre activity having moved to the north.

By the time the 42nd Street project area was proposed in the early 1980's, as contrasted with the surrounding area with new hotel, office and residential construction, the project area contained either vacant lots or underutilized parcels supported by deteriorated and obsolete buildings. The economic and social character of the project area was determined principally by street level retail uses which contributed to and supported the street conditions prevailing at that time. Such uses included 14 movie houses whose fare consisted of either pornography, horror or martial arts. These operated over long hours with high patron turnover and

contained a considerable amount of illicit activity. In fact 42nd Street contained the largest concentration of sex related businesses in the city and many were located near the area movie houses. Contributing also to the character of the area was the fact that 16 establishments, excluding restaurants, sold either beer or liquor. The project area's 20 plus fast food shops, amusement and arcades while posing no direct problem, did reinforce the area's problems by providing support and loitering areas for those engaged in questionable street activity.

The three area "hotels", the Strand, National and Carter similarly provided support in part for such illegal activity as prostitution and drug dealing. Indeed, the subject Strand Hotel was closed for that latter reason.

Details with respect to the high degree of illegal street or other related sordid activities which gave to the area its unsavory reputation are set forth in greater detail statistics in Haim's appraisal and in the final Environmental Impact Statement (§2, 82-87) submitted in connection with this project. Indeed the blighted condition of the area was recognized by the Court of Appeals in Jackson v. UDC, 67 New York 2d 400, 412 (one of the many decisions involving unsuccessful challenges to the project).

In sum, the area pre-project had been the subject of pervasive deterioration both physically and socially over many years, with a long standing unsavory reputation which resisted change or rehabilitation. Any examination as to the project area's potential for redevelopment absent the project

thus must be had against this historical backdrop of area crime, loitering, deterioration and general unsavory reputation.

Addressing specifically Albert's development claim for the subject property, he does not seriously urge or persuade that any developer would build just on claimant's 18' x 120' lot. Such a structure would not have been economically viable. Rather he contends that it would have been acquired to be part of an assemblage site for a large mega building to be developed over the eastern portion of claimant's block bounded on the west by the Lyric and Victory theatres and on the east by 7th Avenue, an area of some 29,000 S/F. However, while this valuation is grounded upon the premise that an appropriate site would be assembled no specifics are provided identifying by whom, how large and when. Further, even if such hypothetical developer were considering assembling an appropriate size site in this area he would be immediately aware that it would be surrounded still by the unsavory street activity that permeated the project area and gave it its reputation. Such developer would not have the advantage of condemnation to globally eliminate these problems.

In addition to the deterrent effect street conditions have had and would have in discouraging commercial investment in redevelopment there is the further potential difficulty in assemblage due, not only to the fact that the parcels in this area are in different ownerships, but also because of cost of acquisition. Purchase of and assemblage would not come cheap or easy. These properties contain high volume and highly profitable cash businesses which could and would resist

development (as they did this condemnation). Parenthetically, the other project claimants' properties, which made up Albert's proposed development site have submitted damage values similarly predicated on development in the area aggregating some $65,000,000, values even in excess of their own vacant land values. Unlike compensation paid in condemnation, which is fixed at market, a private assemblage must pay what is asked.

While fair market value may take into account a parcel's probable assemblage with other properties such "speculative use must be substantiated by proof of facts that indicate a likelihood that the property would be put to such use within a reasonable close future" (Matter of the City of New York (Dexter Motors Inc.), *supra* 21 A.D.2d, 652, 653, aff'd, 16 New York 2d, 814).

In the instant case there is "no probative evidence to support the conclusion that the other properties were available to form an assemblage with the subject parcel" (S. Robert Scheur, as Trustee v. State of New York, 65 A.D.2d, 921, Matter of City of Rochester v. Iman, 51 A.D.2d, 651). Nor was there any indication that without condemnation such assemblage would have been undertaken privately and a market for claimants' parcel (or air rights) created thereby "within a reasonably close future". In sum, "if the parcels were not brought together by a taking under eminent domain the chance of their being united by agreement or purchase in such a way as to be available well may be regarded as too remote and speculative to have any legitimate effect upon the valuation" (McGovern v. City of New York, 229 U.S. 363, 372).

Appendix

Also significant on the probability of development at the times suggested by claimant is the fact that the very climate for development in the 1980's upon which claimant bases a market for its property, resulted in a glut of new commercial space. So much so that the instant project was amended to put on hold the original commercial towers planned for the area.

Even more unpersuasive is claimants hypothesized retention of the existing hotel with sale of excess air rights to an adjacent site. Transfer development rights (TDR) have limited potential recipients. In this case they would be adjacent sites to the east and west of claimant's parcel.

Besides claimant's disreputable hotel, the eastern portion of claimant's block contained fast food establishments, bars and other sources of beer and liquor, a pin ball arcade and an active movie all operating on extended hours. Immediately to the west of this area were theatres and other businesses which similarly attracted unpalatable street activity, conditions, which at least prior to this project, showed no sign of change in the foreseeable future. It is not reasonable to assume that a developer would expend sums to acquire and put up a first class building to still be surrounded by continuing deterioration and crime. Nor, as indicated, are there sufficient facts to indicate when, if ever, a demand for said TDRs would be created. What is also interesting is that almost all other claimants' parcels in this portion of the project area, in order to maximize value claims, opine retention of the existing structures with sale of unused air rights. It is not entirely clear who is to receive all these air rights since none have opted to be a receptor site.

In sum, claimant does not persuade that there was a reasonable probability that its property or air rights would have been marketable for assemblage purposes. There certainly was no hint of it prior to 1980. Indeed, the only apparent assemblage for development in the project area was that on a 42nd Street/8th Avenue in the 1960's, and that failed leaving a site that became a parking lot and remained so at vesting.

It is therefore clear that the instant condemnation or "threat" thereof did not effect the value of the claimant's property. To opine that this 18' by 120' lot or its air rights would have been marketable at an enhanced price based upon a need by some yet unknown site assembler for claimant's land or TDRs would be pure speculation and is unsupported by the facts in this case (Scheuer v. State of New York, 65 A.D.2d 921).

"Care must be taken, however, not to substitute for reality the mere hope of the owner that the property may be used for some specific purpose. Therefore, in order to merit consideration the potential user must be so reasonably probable as to motivate a prospective purchaser in his desire to acquire the property" (Nicholas, Law of Eminent Domain, Section 12B.14[2], citing U.S. v. Toronto, Hamilton et al (338 v. U.S. 396, McGovern v. New York, 229 U.S. 363). Such has not been demonstrated herein.

The court thus concludes that highest and best use for this property is as it existed and the compensation to be awarded will be determined upon that basis. Though both

Appendix

Haims and Albert obtained value for the hotel through analysis of "comparable hotel sales", to obtain an adjusted S/F building value for the subject property, the Court finds, because of the limited number of comparables used, and significant difference in the hotel service and ambience provided by these comparables in contrast with what the Strand offered, and the exaggerated adjustments required to obtain "comparability", that the sales comparison approach to value, is not persuasive in this case.

While there may be some slight entrepreneurial aspect involved in income generation, the Court concludes that both appraisers alternative income capitalization analyses can more appropriately be employed herein to obtain value. The Court adopts claimant's $40 daily room rate (a melded rate which takes into account a potentially higher rate for rooms with bath and a lower one for those without). The Court further finds that by reason of the age and condition of the building, the minimal services provided and the fact that a substantial number of rooms are without bath, that a 50% vacancy rate is appropriate. The result is a gross stabilized annual room rental income of $781,000 ($40 x 365 [days] x 107 [rooms] x .50 [vacancy rate]).

For the 10,000 s/f of available store space the Court finds from an analysis of comparables submitted a s/f value of $60 to yield a store income of $60,000. A further income of $15,000 is found for potential signage. The foregoing results in a total gross building income of $856,000. From this the Court will deduct a 5% vacancy factor from the store and signage income ($3,750) leaving a gross effective income of

$852,250. Against this the Court will deduct stabilized expenses in the manner suggested by Albert, as follows:

Real Estate Taxes (actual)	$ 35,925
Room expense (30% of hotel income)	234,000
Energy (2.50/room/day x 365x107x.50)	48,818
Administrative (hotel) 10% of hotel income	78,100
Insurance ($2.00 room/day x 365x107x.50)	39,055
Reserves (3.5% hotel/income)	27,335
Room rehab., $3,000/room-15yr. amortization	64,031
Property operations/maintenance ($3.00 room/day x 365x.50)	58,582
Management (5% of gross building income)	42,612
Total	$628,458

The result is a net operating income of $223,802 ($852,250 - $628,458). Adopting a capitalization rate of 11% results in a damage value for this property of $2,034,565. Settle order and decree.

Dated: 8/18/97 J.S.C.